In the Supreme Court of the United States

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1979

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The respondent, ARMCO Steel Corporation would respectfully pray that this Honorable Court deny the Writ of Certiorari and not review the opinion of the Tenth Circuit entered in the proceedings on February 14, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, 529 F.2d 1133, and the opinion of the United States District Court for the Western District Court of Oklahoma, 542 F.Supp. 243 appear in the Appendix.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 3:

> *"Commencement of Action* — A civil action is commenced by filing a complaint with the Court."

Oklahoma Statutes Annotated, Title 12, Sec. 97 (West Supp. 1978):

> "An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the time of the summons which is served on him or a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to commencement thereof, within the meaning of this article, when the parties faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a recipt of certified mail containing summons within sixty (60 days)."

STATEMENT OF THE CASE

On August 22, 1975, the Petitioner, Fred N. Walker, was injured. On August 19, 1977, the Petitioner filed a complaint in the United States District Court for the Western District of Oklahoma against the Respondent seeking damages for personal injuries alleging a defect in a manufactured product of the Respondent. Summons was also issued on that date. On December 1, 1977, ARMCO Steel Corporation was served with process and on January

5, 1978, the Respondent filed a Motion to Dismiss for the reason that the action was barred by the applicable state statute of limitations. The Honorable Ralph Thompson sustained the Order to Dismiss on April 18, 1978. On February 14, 1979, the United States Court of Appeals for the Tenth Circuit affirmed the decision.

RESPONDENTS ARGUMENT FOR DENYING A WRIT OF CERTIORARI

The decision below by the United States Court of Appeals for the Tenth Circuit properly realized the dichotomy between *Ragan* v. *Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949), and *Hanna* v. *Plumer*, 380 U.S. 460 (1965), that difference being that the *Hanna* case *dealt* with the diversity action involving a state statute which made proper service of process upon a decedent's representative complicated and cumbersome. The *Ragan* case, like the present case, dealt with notice to a defendant, timely within the appropriate state statute of limitations. The *Hanna* case dealt with who was the proper party to serve while the *Ragan* case dealt with timely notification of a pending lawsuit. The case at bar is more similar to the *Ragan* case.

12 O.S., 1971, Sec. 97 is within the Chapter of the Oklahoma Statutes Annotated entitled Limitations of Actions. It has been held to be an integral part of the Oklahoma Statutes of Limitations. *Lake* v. *Lietch*, 550 P.2d 935 (Okl. 1976), the Honorable Ralph Thompson, writing for the District Court in this matter stated:

> "The Oklahoma statute before the Court today *is* an integral part of the Oklahoma Statute of Limita-

tions." 12 O.S., 1971, Sec. 97, defining commencement of suit is codified in the chapter entitled 'Limitation of Actions'. Sec. 97 states that 'an action shall be deemed commenced *within the meaning of this article*, as to each defendant, at the date of summons which is served on him' . . ." (the emphasis is that of Judge Thompson). *Walker* v. *ARMCO Steel Corporation*, 452 F.Supp. 243 (W.D. Okl. 1978).

Petitioner herein would want the Court to believe that Rule 3 of the Federal Rules of Civil Procedure and 12 O.S., 1971, Sec. 97 are in direct conflict. That is simply not the case. In any action filed, compliance with the applicable statute of limitations is mandatory, if properly raised as a defense. The reason for these statutes is that persons will not have to defend stale claims against them and that the defendant have notice of a pending claim within a period prescribed by the state legislature.

Further, it has been recognized that "(i)n a diversity action in Federal District Court, defense of limitations is governed by the law of the state where the action arises." *Dial* v. *Ivey*, 370 F.Supp. 833 (W.D. Okl. 1974). It is interesting to note that the case so heavily relied upon by the Petitioner in this action is that of *Hanna* v. *Plumer, supra*, and that case specifically avoided overruling the effect of *Ragan, supra*. An examination of the Circuit decisions finds that nearly every one that has faced this question, in a case dealing with the staute of limitations, has followed the rule of *Ragan*. This is seen in the cases of: *Silvester* v. *Messler*, 351 F.2d 472 (Mich. 1965), 6th Circuit; *Anderson* v. *Papillion*, 445 F.2d 841 (La. 1971), 5th Circuit; *Witherow* v. *Firestone Tire and Rubber Co.*, 530 F.2d 160 (Pa. 1976), 3rd Circuit; *Groninger* v. *Davidson*, 364 F.2d 638

(Ia. 1966), 8th Circuit; and finally in the 10th Circuit, *Nichols* v. *Eli Lilly and Co.*, 501 F.2d 392 (Okl. 1974). Each and every one of these Circuit decisions were passed upon with the Court fully aware of the decision in *Hanna* v. *Plumer, supra*. In each and every one of these cases, the defendant had no notice of a pending action within the prescribed state statutory scheme. The state scheme is of the utmost importance and this was recognized in the case of *Witherow* v. *Firestone Tire and Rubber Co., supra*, when Mr. Justice Aldisert stated:

> "But certainly a concern for state policies and prerogatives can never be out of place in a system of coordinate sovereignties — as a matter of prudence and comity if not as a matter of constitutional law. Even *Hanna*, while making a vigorous case for the validity of the Federal Rules of Civil Procedure, noted that a Court 'need not wholly blind itself to the degree to which (a federal) rule makes the character and result of the federal litigation stray from the course it would follow in state courts'." (citation omitted)

Further in the opinion:

> "While we avoid mechanical application of the 'outcome-determinative' test, or any other signal test, we observe that nothing could be more 'substantial' than to allow an action to proceed in federal court which would be time-barred in the state court." (emphasis added) *Witherow* v. *Firestone Tire and Rubber Co., supra*.

CONCLUSION

The Respondent would respectfully show this Court that certiorari is not necessary for means of clarification of this issue, nor is it warranted under the facts of this particular case. The United States District Court for the Western District of Oklahoma recognized that 12 O.S., 1971, Sec. 97 is an integral part of the Oklahoma Statute of Limitations and that the Petitioner had not timely prosecuted his action under that statute's direction and that the Petitioner's claim was barred by limitations. The Tenth Circuit upheld that view in its decision. Even being very mindful of the dictates of *Hanna*, the federal courts sitting in a diversity action must not be allowed to lean in a direction which could create confusion between the prosecution of diversity cases which could embody two separate schemes of statutes of limitations within the boundaries of one sovereign state. For the foregoing reasons and with the above cited authority the Respondent respectfully submits that certiorari be denied to the Petitioner and the decision of the United States Court of Appeals for the Tenth Circuit be allowed to stand.

Respectfully submitted,

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Counsel for Respondent

September, 1979

APPENDIX A

[Filed Stamp Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FRED N. WALKER, Plaintiff	)	
vs.	)	No. CIV-77-0816-T
ARMCO STEEL CORPORATION, Defendant	)	

ORDER

Jurisdiction in this action, for personal injury, is founded upon 28 U.S.C. § 1332. Plaintiff's complaint states that he received injuries from defendant's tortious acts on August 22, 1975. Complaint was filed August 19, 1977, three days before the action would have been barred by the Oklahoma statute of limitations. Defendant was served with process on December 1, 1977. Defendant's motion to dismiss presents an essentially simple question which has no concrete answer in this jurisdiction; i.e., when is an action "commenced" in federal court, so as to toll the statute of limitations?

The Oklahoma statute of limitations for tortious injuries is two years. 12 O.S. 1971, § 95. An action is commenced in state court when process issues, provided process is actually served within sixty (60) days after the attempt is made. 12 O.S. 1971, § 97; *Lake* v. *Lietch*, 550 P.2d 935 (Okl. 1976). Plaintiff admits that had this action been filed in state court and service not made until December 1, it would be barred by the statute of limitation.

In federal court, an action is commenced when the complaint is filed. Rule 3, Federal Rules of Civil Procedure. Until 1965, Rule 3 was construed so as to incorporate the entire state statutory scheme for tolling the statute of limitations into federal procedure. *Ragan* v. *Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949); *Murphy* v. *Citizens Bank of Clovis*, 244 F.2d 511 (10th Cir. 1957). However, in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), the Supreme Court, in determining propriety of service, relied on Federal Rule 4d, rather than state law, which was in conflict. The Court in *Hanna* did not overrule *Ragan* v. *Merchants Transfer & Warehouse Co., supra*, in fact, *Ragan* was distinguished by the *Hanna* Court at page 469. However, following the *Hanna* decision, the circuits have been in conflict as to whether state law or Federal Rule 3 governs commencement of a suit. The majority rely on *Ragan* and determine commencement of suit by applying state law. *Witherow* v. *Firestone Tire & Rubber Co.*, 530 F.2d 160 (3rd Cir. 1976); *Anderson* v. *Papillion*, 445 F.2d 841 (5th Cir. 1971); *Groninger* v. *Davison*, 364 F.2d 638 (8th Cir. 1966); *Sylvester* v. *Messler*, 246 F.Supp 1 (E.D. Mich. 1965), aff'd 351 F.2d 472 (6th Cir. 1965), cert. denied 382 U.S. 1011. See also *Dial* v. *Ivy*, 370 F.Supp. 833 (W.D. Okl. 1974), where the Court held that the state statute controlled, without commenting on *Hanna*. For the minority view, see *Sylvestri* v. *Warner & Swassey Co.*, 398 F.2d 598 (2nd Cir. 1968).

The Tenth Circuit has withheld decision on this issue. In *Chappell* v. *Rouch*, 448 F.2d 446 (10th Cir. 1971), the Tenth Circuit was presented with a question of whether Kansas law or the Federal Rules of Civil Procedure governed the commencement of suit so as to toll the Kansas statute of limitations. The trial court had overruled a motion to dismiss, holding that Federal Rule 3 determined when suit was commenced because *Hanna* v. *Plumer* had "modified *Ragan* to the end that the federal rule, rather

than the state statute, controls and fixes the time the [action was] commenced." (Chappell at 448.) The Tenth Circuit commented on the trial court's ruling, stating:

> "In our view of the matter, however, *Ragan* is distinguishable on its facts from the instant controversy and though we agree that *Hanna* governs, we need not here come to grips with the intriguing question as to whether *Hanna* overrules *Ragan*, a matter on which there is considerable difference of judicial thought." Id at 448.

The Court went on to distinguish the *Ragan* rule from the facts before it. The Kansas statute relied on by the defendant was not an "integral" part of the Kansas statute of limitations. The Kansas statute defining commencement of actions was in the chapter on civil procedure and was not inextricably intertwined with the statute of limitations. The chapter entitled "Limitation of Actions" had no provision defining when and how commencement of actions would toll the statute of limitations. The Court summarized and concluded as follows:

> "The narrow issue now to be resolved is whether we are prepared to hold that K.S.A. 60-203 [defining commencement of suit] is an 'integral part' of K.S.A. 60-501 and 60-513(4) [statutes of limitation]. If we do so hold, then *Ragan* would control, assuming *Ragan* has not been modified, if indeed not overruled, by *Hanna*. As indicated, we need not here make that determination as in our view K.S.A. 60-203 is not under the circumstances an integral part of K.S.A. 60-501 and K.S.A. 60-513(4). . . . Rather, K.S.A. 60-203 is just what the Kansas legislature declared it to be, a statute setting forth a rule of civil procedure. So, it boils down to a determination as to whether a Kansas statute promulgating a rule of civil procedure as to when an action is commenced takes precedence in the

federal courts over Fed.R.Civ.P. 3, with which it is in direct conflict. All of which brings into play the rule of *Hanna*." *Chappell*, at 449.

The Oklahoma statute before the Court today is an integral part of the Oklahoma statute of limitations. 12 O.S. 1971, § 97, defining commencement of suit, is codified in the chapter entitled "Limitation of Actions". Section 97 states that "an action shall be deemed commenced, *within the meaning of this article*, as to each defendant, at the date of the summons which is served on him . . ." (emphasis added). The preceding sections in the article define the statute of limitations for various types of injuries. 12 O.S. 1971, § 97 is an integral part of the Oklahoma statute of limitations and would bar this suit if *Ragan* is still the law.

Having no express ruling from the Tenth Circuit on the effect of *Ragan* on these facts, this Court is free to treat the question as one of first impression. The Court is persuaded that *Hanna* did not overrule *Ragan*. The United States Supreme Court has not been shy to overrule cases expressly, and the fact the Supreme Court not only did not overrule *Ragan*, but in fact *distinguished* it, in *Hanna*, persuades this Court that *Ragan* still controls. Even limiting *Ragan* to its facts, dismissal of this suit is required. The Oklahoma definition of commencement of actions is an integral part of the Oklahoma statute of limitations. The rule of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938) requires that in diversity cases, litigants in federal court receive no advantages over those in state court. To ignore the Oklahoma statute in question here would give plaintiff greater rights in federal court than he would receive in state court, a result not allowed after *Erie*.

Plaintiff's complaint, on its face, is barred by the Oklahoma statute of limitations and the Oklahoma definition

of commencement of suit. Accordingly, defendant's Motion to Dismiss is granted, and plaintiff's complaint is, by this order, dismissed.

It is so ordered this 18th day of April, 1978.

(s) RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED IN CIVIL DOCKET ON APR 18 1978

APPENDIX B

PUBLISH

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1477

FRED N. WALKER,	)	Appeal from the
	)	United States
Plaintiff-Appellant	)	District Court
v.	)	for the
	)	Western District
ARMCO STEEL CORPORATION,	)	of Oklahoma
	)	(D.C. No.
Defendant-Appellee	)	77-0816-T)

Submitted on the briefs.

Don Manners of Manners, Cathcart & Lawter, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Burton J. Johnson and Richard L. Keirsey of Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, for Defendant-Appellee.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is a Calendar C case.

This is a diversity action which raises the question whether Rule 3 of the Federal Rules of Civil Procedure or § 97 of Okla. Stat. title 12 (West Supp. 1978) determines

when a case is filed in the federal court. Is it a state law or federal question? The underlying problem is whether Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) or Hanna v. Plumer, 380 U.S. 460 (1965) governs.

The United States District Court for the Western District of Oklahoma dismissed the action on the ground that it was outlawed by the statute of limitations in Oklahoma because it had not been filed in accordance with the Oklahoma rule; that although the case was actually filed in time, process was not served within the period of limitations prescribed by the Oklahoma statute. The trial court reasoned that the Oklahoma filing rule was integrated in the pertinent Oklahoma limitations provision. The trial court ruled that Hanna v. Plumer, *supra*, did not expressly overrule Ragan v. Merchants Transfer & Warehouse Co., *supra*, and, therefore, the latter case governed.

The facts are these:

Appellant Walker suffered an injury when a nailhead fragmented and hit his right eye, on August 22, 1975, while he was engaged in his work. The suit against Armco Steel Corporation, the manufacturer of the nail, alleges that the nail was defective. The complaint was filed in the Clerk's office of the United States District Court for the Western District of Oklahoma on August 19, 1977. Summons was issued the next day. For reasons which do not appear in the record, process was not served on Armco until December 1, 1977. On January 5, 1978, Armco filed a motion to dismiss plaintiff's complaint asserting that the statute of limitations barred the action. The motion was granted on April 18, 1978. The date of filing was three days prior to the date that the two-year statute would have barred the action. The issue, as indicated above, is when, if ever, the statute of limitations is tolled.

The Oklahoma statute which was relied on by the trial court and which is here sought to be applied reads:

> An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a codefendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons, within sixty (60 days).

Okla. Stat. Ann. tit. 12, § 97 (West Supp. 1978).

The above statute makes provision for faithful and diligent endeavor to procure service if it is carried out within 60 days of date of issuance, provided the summons is issued within the limitations period. Although the summons here was shown to have issued on time, the service was not completed within 60 days, nor is there any evidence that there was a diligent attempt to procure service. Therefore, the only hope which the plaintiff-appellant could entertain would be that the federal procedural provision would be ruled applicable.

There is another provision in the Oklahoma compilation, Okla. Stat. Ann. tit. 12, § 151 (West Supp. 1978), which provides that:

> A civil action is deemed commenced by filing in the office of the court clerk of the proper court a petition and by the clerk's issuance of summons thereon. Where service by publication is proper, the action shall be deemed commenced at the date notice of publication is signed by the court clerk. Where service

> is sought to be effected by mailing, the action shall be deemed commenced when the envelope containing summons, addressed to the defendant or to the service agent if one has been appointed, is deposited in the United States mail with postage prepaid for forwarding by certified mail with a request for a return receipt from addressee only.

There is no indication, however, that this adds anything to §§ 95 and 97, both of which are construed by the Oklahoma Court of Appeals and the Supreme Court as limitation provisions.

The applicable Federal Rule is free of all of these complications. Rule 3 of the Federal Rules of Civil Procedure simply provides: "A civil action is commenced by filing a complaint with the court."

The question which we must consider is whether the Oklahoma statute, § 97, must be applied as the trial court applied it or whether Rule 3 of the Federal Rules of Civil Procedure should have been held to govern. The underlying issue is whether the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) is, consistent with the basic diversity notion that a federal court, sitting in diversity cases and administering state law, must apply not only substantive law of the forum state, but procedural law as well if the application of state procedural law changes the outcome of the case.

Unquestionably, § 97, *supra* (the Oklahoma statute, is in direct conflict with Rule 3 of the Federal Rules of Civil Procedure with respect to what constitutes a filing which will toll the statute of limitations. That the Oklahoma provision is not only a filing provision but a limitations one as well is to be gleaned from the statute as well as the cases. *See, for example,* Tyler v. Taylor, Okl.App., 578 P.2d 1214 (1977), and State ex rel. Roacher v. Caldwell, Okl., 522 P.2d 1031 (1974). So even though the Oklahoma

statute may be complex and even mysterious as compared with the federal provision in that it obligates the litigant not only to timely file the case but also to see that process issues and that the adversary is served on time in order to toll the statute of limitations, it is the law of Oklahoma. The fact that the local law appears technical and cumbersome is not a factor to be weighed. The controlling aspect is whether the outcome of the case is changed as a result of applying or not applying the state rule.

In support of the mentioned approach, defendant-appellee urges that the Supreme Court's decision in Ragan v. Merchants Transfer & Warehouse Co., *supra,* which held state law to be applicable in deciding when a case has been filed for purposes of tolling the statute of limitations, governs. *Ragan,* it is to be noted, is a decision which originated in this circuit, and a Kansas statute similar in terms to the Oklahoma statute before us (§ 97, *supra*), was applied in preference to the federal rule on the same subject. As in the present case, the Kansas statute required filing of the complaint, issuance of the summons and service of the summons. All of these were tied to the limitations statute. Indeed this court upheld the district court determination that the requirement of service of summons within the statutory limitation "was an integral part of that state's statute of limitations."

Ragan, of course, religiously followed Guaranty Trust Co. v. York, 326 U.S. 99 (1945). The outcome test was thus held to apply even in this area of pure procedure. The question boils down to whether *Ragan* must be applied here.

The Supreme Court's decision in Hanna v. Plumer, *supra,* gave promise that the corner had been turned, so to speak, as far as *Guaranty* and *Ragan* continuing to dominate where the question is one of pure procedure such as we have here. *Hanna* construed a Massachusetts statute which had the same kind of complicated statute with re-

spect to mode of service of process as we find here. In *Hanna,* as here, the application of the outcome test would have resulted in the state law being applied and in the defendant prevailing. In the opinion which was written by Chief Justice Warren, the outcome determinative test was rejected and the Federal Rules of Civil Procedure were ruled applicable. However, the Court in a footnote distinguished *Ragan* even though *Ragan* had applied the outcome determinative test which the Court was engaged in rejecting at least to the extent that pure procedural questions were being decided. The *Hanna* opinion observed that every procedural variation is in fact outcome determinative. The Court acknowledged that the outcome determinative test would have a marked effect on the outcome of litigation before it. It said, however, that the test was not to be regarded as a talisman. Inasmuch as *Ragan* is based entirely upon the *Guaranty Trust* conception that outcome determinative is the answer, the refusal of the Court to apply this result in the *Hanna* decision is irreconciable with that in *Ragan.*

We simply point up the dilemma. We do not do so in any spirit of criticism. The present problem is, however, that the Supreme Court in *Hanna,* although it could be said to have shown dissatisfaction with *Ragan,* did not expressly overrule it. Professors Wright and Miller have pointed this out and have noted also that the Supreme Court knows how to overrule a case when it wishes to do so. They further observe that *Ragan* has continued vitality. *See* 4 C. Wright & A Miller, Federal Practice and Procedure: Civil § 1057 at 190-191 (1969). It is true, however, that although the circuits are divided on the question, the preponderance of the circuits and the district courts within the circuits support the view that *Ragan* continues to be viable.

More recently this court rendered an opinion which selected Rule 3 of the Federal Rules of Civil Procedure. This was in Chappell v. Rouch, 448 F.2d 446 (10th Cir. 1971). This action arose in Kansas as did *Ragan,* but the statute which was considered in *Ragan* had been modified. The reasoned opinion by Judge McWilliams concluded that *Ragan* was not binding in view of this fact. The Oklahoma statute which we consider, however, is indistinguishable from the statute which was construed in *Ragan,* so even if we were desirous of applying Rule 3, which we are, we are not free to do so. (This writer at least would prefer the federal rule.)

This court has recently issued its opinion in Lindsey v. Dayton-Hudson Corp., No. 77-1051. The opinion by Judge Logan is extremely well presented and it too adopts the view that Ragan continues to be authoritative.

We recognize that decisions are frequently allowed to die on the vine, so to speak. We also recognize that in such instances death does not, as a practical matter, take place. If, however, *Ragan* was intended to die a natural death, it failed to happen.

In the Tenth Circuit we have in addition a judicial administration problem, because since the *Ragan* case originated here it continues to be the law of this circuit. The Tenth Circuit affirmed the trial court's decision, and the Supreme Court not only affirmed the Tenth Circuit, but lavishly praised the decision as well.

The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between *Ragan* and *Hanna.* So far it has not done so, and until the Supreme Court acts we feel constrained to follow *Ragan.*

Accordingly, the judgment of the district court is affirmed.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FRED N. WALKER,	)	
	)	
Appellant,	)	
	)	
vs.	)	NO. 78-1477
	)	
ARMCO STEEL CORPORATION,	)	
	)	
Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
STATE OF OKLAHOMA

BRIEF OF APPELLEE
ARMCO STEEL CORPORATION

This case involves an appeal from the lower Court decision of the United States District Court for the Western District of Oklahoma in which the Plaintiff's action was dismissed by the Honorable Ralph G. Thompson, District Judge. The Plaintiff, Fred N. Walker, has appealed that decision to this Court. Jurisdiction in this case was based upon the diversity of citizenship of the Plaintiff and the Defendant; there was no dispute as to the jurisdictional amount in question. The Complaint was filed in the lower Court on August 19, 1977 based upon a cause of action for injury which arose on August 22, 1975. There is no dispute that the applicable Statute of Limitations is two years, under 12 O.S. 1971, Section 95. Summons was issued on August 19, 1977, but was not served until December 3, 1977. The reason for the delay in the service has not been explained, but, in fact, the service agent of the Defendant,

properly registered with the Secretary of State of the State of Oklahoma and properly listed upon the Summons issued by the Plaintiff, is located within a matter of blocks from the office of the Court Clerk of the United States District Court for the Western District of Oklahoma.

PROPOSITION ONE

STATE STATUTES OF LIMITATIONS ARE SUBSTANTIVE TO BE FOLLOWED BY FEDERAL DISTRICT COURTS IN DIVERSITY CASES.

A long and well understood rule that State Statutes of Limitations, more specifically the Oklahoma Statutes of Limitations, 12 O.S. 1971, Section 91 et seq., are substantive law and to be followed in the Federal District Courts in which the particular Court sits. *Ragan* vs. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. (1949); in Oklahoma: *Nichols* vs. *Eli Lillie Co.*, 501 F.2d 392 (1974); *Dial* vs. *Ivy*, 370 F.Supp. 833 (E.D. Okl. 1974). The Federal Courts, including this Court, have gone further still in saying that the State Court decisions construing the applicable Statutes of Limitations are controlling upon a Federal Court in diversity cases. This is true of all state substantive law and follows the line of cases beginning with *Erie Railroad Company* vs. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). In fact, this Court has made such a determination of the Oklahoma Statutes of Limitations in the case of *Nichols* vs. *Eli Lillie Co.*, (supra). This Honorable Court said in that decision curtly:

> "The Oklahoma decisions are controlling". (Referring to the Oklahoma Statutes of Limitations. 12 O.S. 1971, Section 91 et seq.)

PROPOSITION TWO

12 O.S. 1971, SECTION 91 IS AN INTERGAL PART OF THE OKLAHOMA STATUTES OF LIMITATIONS AND IS SUBSTANTIVE LAW TO BE APPLIED BY THE FEDERAL COURTS IN DIVERSITY CASES.

The Statutes of Limitations of the State of Oklahoma are located in Chapter 3 of the Civil Procedure Title of the Oklahoma Statutes, more particularly 12 O.S. 1971, Section 91 et seq. Within that Chapter, defining the limitations of actions, is found 12 O.S. 1971, Section 97. It states, in pertinent part:

> "An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. For service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure service that such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons within sixty (60) days." 12 O.S. 1971, Section 97.

The Oklahoma Supreme Court has held that the above quoted Section is part of the Statutes of Limitations, and not merely a service provision. In the case of *Lake* vs. *Lietch*, 550 P.2d 935 (Okl. 1976), the Oklahoma Supreme Court stated in construing a service statute, 12 O.S. 1971, Section 154.5, which is conflicting with 12 O.S. 1971, Section 97:

"There were no statute of limitations at common law; they are creatures of statutes. Statutory exceptions should be strictly construed and cannot be enlarged from the consideration of inconvenience."

"It was not the intent of the legislature in this inaction (12 O.S. 1971, Section 154.5) to circumvent the statute of limitations entirely."

Plaintiff has admitted that had this action been brought in State Court and service not made until December 1st, it would have been barred by the Statutes of Limitations enacted by the Oklahoma Legislature.

It is important to note that the Oklahoma Supreme Court in the case of *Lake* vs. *Lietch,* (supra) treated 12 O.S. 1971, Section 154.5. The latter cited Statute is in Chapter 6 of Title 12 of the Oklahoma Statutes. That Chapter primarily deals with the methods and mechanics by which service is procured, i.e. publication, personal service, substitute service. Judge Thompson in his Order in this case also recognized that the Supreme Court has dealt with 12 O.S. 1971, Section 97 as a Statute of Limitations provision and stated:

"The Oklahoma Statute before the Court today *is* an intergal part of the Oklahoma Statute of Limitations. 12 O.S. 1971, Section 97, defining commencement of suit, is codified in the Chapter entitled 'Limitation of Actions'. Section 97 states that 'an action shall be deemed commenced *within the meaning of this article,* as to each defendant, at the date of summons which is served on him . . .' (The Emphasis is that of Judge Thompson). *Walker* vs. *Armco Steel Corporation,* 452 F.Supp. 243 (W.D. Okl. 1978).

The District Judges of the United States District Court for the Western District of Oklahoma are required to deal daily, in diversity cases, with the substantive law, both

statutory and case law, of Oklahoma. This includes construing the Oklahoma Statutes of Limitations. These District Judges are knowledgable and experienced in dealing with Oklahoma law and this Court has stated, on many ocassions, that great deference should be afforded a District Court Judge's interpretation of the state law of the state within which he sits. *Vaughn* vs. *Chrysler Corporation,* 442 F.2d 619, certiorari denied 404 U.S. 857, 92 S.Ct. 106, 30 L.Ed. 2nd 98 (10th Cir. Okl. 1971). *Buzzi* vs. *Hocker,* 370 F.2d 533 (10th Cir. Okl. 1966). *Soloman* vs. *Downtowner of Tulsa, Inc.,* 357 F.2d 449 (10th Cir. Okl. 1966). This is not meant to infer that Oklahoma is unique, but the above stated rule applies uniformly across the United States, in that United States Courts of Appeal recognize the fact that United States District Judges sitting in the several states are in a position, better than they, to interpret their local state law because of their constant and daily exposure in diversity cases.

PROPOSITION THREE

12 O.S. 1971, SECTION 97 IS NOT IN DIRECT CONFLICT WITH RULE 3, BUT MERELY QUALIFIES IT UNDER THE OKLAHOMA STATUTES OF LIMITATIONS

The Appellant has urged this Court to make a decision that Rule 3 and Section 97 are in direct conflict. This is simply not the case upon a close examination. There is no doubt that if the Plaintiff had obtained service within sixty (60) days the lawsuit would have been timely commenced. However, just as if they had filed the Complaint late, failing to obtain proper service within sixty (60) days is in non-compliance with the Oklahoma Statutes of Limitations.

Further, they have suggested that a ruling in the Appellee's favor would be cumbersion upon the Federal Courts, in that they would have to examine a state statutory scheme before a decision could be reached in diversity

cases. Each and every time an action is commenced one of the first points of concern to the litigants is any limitation of action. The Statute here is clear and the decisions under it uncomplicated. This is not a matter as who is served, nor by which method, such as publication, substitute service, constructive service or public notice. Rule 97 is not a "housekeeping rule" but a substantive limitation of action as defined by the Oklahoma Supreme Court.

The United States Court of Appeals for the Sixth Circuit stated in short fashion, that in issues dealing with the tolling of Statutes of Limitations that *Ragan* controls and *Hanna* does not, pointing out that the Supreme Court carefully refrained from overruling *Ragan*. *Sylvester* vs. *Messler*, 246 F.Supp. 1 (E.D. Mich. 1965), affirmed 351 F.2d 472 (6th Cir. 1965), cert. denied 382 U.S. 1011, 86 S.Ct. 619 15 L.Ed. 2nd 526. District Judge Kaess, in *Sylvester* (supra) quoted the Michigan Statute, similar to the Oklahoma Statute, and stated that, under Michigan law in diversity actions, the State Statute would apply, citing *Ragan*. The Eighth Circuit cited *Sylvester* vs. *Messler*, (supra) in ruling on an Iowa Statute by stating:

> "We nevertheless must conclude that the majority of the Supreme Court, in supporting the opinion written by the Chief Justice, felt that it (referring to *Hanna)* was not an overruling of *Ragan*. Until the Supreme Court itself overrules its very positive statement in *Ragan*, the lower Courts must follow its holdings." *Groninger* vs. *Davidson*, 364 F.2d 638 (8th Cir. 1966).

The United States Court of Appeals for the Fifth Circuit has also continued to distinguish *Hanna* and *Ragan* and cited *Sylvester* vs. *Messler*, (supra), by holding that a Louisiana Statute would have barred recovery by the Plaintiff, had the action been brought in State Court, and sustained a lower Federal Court's ruling dismissing the action. *Anderson* vs. *Papillion*, 445 F.2d 841 (5th Cir. 1971).

It is even the view of prominent commentators that *Ragan* is still good law and proper for precedent in like cases:

> "*Ragan* and similar cases may still be read as holding that Rule 3 does not determine or measure the point at which certain state-created rights are extinguished and that this conclusion is unaffected by *Hanna*.
>
> It would be well to remember that the Supreme Court knows how to overrule past decisions when it wishes to do so, and it has not felt inexorably bound by stare decisis on matters of procedure. The Court did not overrule *Ragan* in *Hanna* nor did it hold that in Massachusetts mere filing under Rule 3 was sufficient to commence the action and thereby toll the statute of limitations; on the contrary, it upheld the need for service of process as required by Massachus law. Inasmuch as the Court did not overrule *Ragan* but took pains to indicate why *Hanna* was not inconsistent with the earlier case, it seems the safer course to assume that the *Ragan* decision is still authoritative." C. Wright, A. Miller, and E. Cooper, 13 *Federal Practice and Procedure*, Section 3601 (1975) (Footnotes omitted).

Judge Thompson, in the lower Court's decision in this matter, specifically recognized that were this case a matter of how service was procured technically, the Federal Rules of Civil Procedure would apply, however, had this action been brought in State Court the Plaintiff's action would have been dismissed, because the Statutes of Limitations had run pursuant to 12 O.S. 1971, Section 97. Probably the most probing opinion on matters of this kind is the opinion written in *Witherow* vs. *Firestone & Rubber Co.*, 530 F.2d 160 (3rd. Cir. 1976). In that opinion, Justice Aldisert aptly stated that:

"The nub of the policies that underlies *Erie Railroad Company* vs. *Tompkins* is that for the same transaction the accident of a suit by non-resident litigant at a Federal Court instead of a State Court a block away, should not lead to a substantially different result."

"While we avoid mechanical application of the 'outcome determinative' test, or any other single test, we observe that nothing could be more 'substantial' than to allow an action to proceed in Federal Court *which would be time barred in the State Court.*" (Emphasis Added) *Witherow* vs. *Firestone Tire & Rubber* (supra).

CONCLUSION

The Appellant seeks relief in this Court in a manner in which the District Court Judge dismissed the action for failure to timely commence his action against Appellee, Defendant below. He would urge to this Court that the time of service is only a technical rule of service and should be judged by Rule 3 of the Federal Rules of Civil Procedure. As stated before all Statutes of Limitations are statutory and not creatures of the common law; they are to be strictly construed and the Oklahoma Statute in question, by its own language, is a limitation upon the time within which an action may be brought against a Defendant in the State of Oklahoma. By the Appellee's own admission, this claim would have been barred before the State Courts, not for a technicality but for the time in which it was done. All Statutes of Limitations necessarily have to deal with the timeliness within which an action may be brought.

The Oklahoma Statute in question has been given strict construction by the Oklahoma Supreme Court, in the cases cited above, and Judge Thompson, in recognizing this judicial interpretation, has held the Plaintiff to the

same standards in Federal Court as that which he would be held in the State Court. Other United States Courts of Appeal have recognized the fact that the Federal Rules must defer to the express State Statutes when the Statutes of Limitations are involved with the timeliness of the service of process. It is the position of the Appellant, supported by the sound reasoning of other circuits, that urges that this Court affirm the lower Court's dismissal of the Plaintiff's action, in that the Defendant should be afforded the same substantive rights as to when he may be sued, when service may be had upon him, and when an action is prosecuted against him, not withstanding which side of the street and in what court house the action is brought.

Respectfully submitted,

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CERTIFICATE OF MAILING

On this 20th day of September, 1978, a true and correct copy of the above and foregoing Brief was mailed to: Mr. Don Manners, of Manners, Cathcart & Lawter, 1510 North Klein, Oklahoma City, Oklahoma 73106, attorneys for Appellant.